

STATE OF MICHIGAN
COURT OF APPEALS

EDWARD THURSAM III,

Plaintiff-Appellee,

v

CITY OF DETROIT,

Defendant-Appellant.

UNPUBLISHED

April 10, 2008

No. 277071

Wayne Circuit Court

LC No. 06-604395-NO

Before: Zahra, P.J., and Whitbeck and Beckering, JJ.

PER CURIAM.

Defendant city of Detroit appeals as of right the March 22, 2007 order denying its motion for summary disposition under MCR 2.116(C)(7), (8), and (10). We affirm.

In November of 2004, plaintiff Edward Thursam was injured on a sidewalk along an overpass in the defendant city of Detroit. The overpass carries John R. Street, a city street, over the I-75 Fisher Freeway. While plaintiff was walking on the sidewalk along the overpass, he stepped into a hole and fell, suffering serious injuries to his left wrist and hand. The hole contained subsurface electrical wiring for the overhead street lighting. Although the hole was typically covered by a hand hole cover, it was not covered at the time of plaintiff's accident.

In February of 2006, plaintiff filed suit against defendant, alleging that defendant violated its duty under the highway exception to governmental immunity, MCL 691.1402 *et seq.*, to keep its sidewalks in reasonable repair and safe for public travel. Defendant argued that it was immune from liability and filed a notice of non-party fault, naming the state of Michigan as a party which may be liable for plaintiff's injuries. As a result, plaintiff filed suit against the Michigan Department of Transportation (MDOT). Defendant subsequently moved for summary disposition. Defendant argued that it was immune from liability because the John R. overpass and the sidewalk along the overpass was under the jurisdiction of MDOT.

In support of its motion for summary disposition, defendant presented evidence that MDOT constructed the John R. overpass in 1999. Additionally, city employees testified that the overpass was in the "Fisher Freeway right of way" and that MDOT was responsible for maintaining the overpass. Defendant admitted, however, that it was responsible for maintaining the overhead lighting over John R. Street, including the subsurface electrical wiring in the hole where plaintiff fell. Defendant further admitted that it claimed the mileage on the John R.

overpass for state funding purposes. Additionally, plaintiff and MDOT presented evidence that although MDOT was responsible for maintaining the structural integrity of the overpass, defendant was responsible for maintaining the locally owned road and sidewalks above the overpass. An August 2002 MDOT memorandum stated, in part:

Where the state trunkline highway passes under a locally owned road, street, or a pedestrian walkover serving a locally owned road or street, the Michigan Department of Transportation will maintain its road and the structural integrity of the deck, superstructure, substructure, footings, retaining walls, and the following integral parts of the structure: sidewalks, curbs, railing, and pedestrian screening.

* * *

The department will not be responsible for the maintenance of the locally owned road or street, or any of the following that is beyond the structure abutments: approach, pavement, embankments, drainage facilities, curbs, sidewalks, railing or guardrail. Nor will the department be responsible for the maintenance of the following located on the structure: street lighting, traffic signals, snow and ice removal, temporary patching of potholes and other depressions on the deck surface or sidewalks not affecting the structural integrity of the bridge, sweeping and cleaning of the structure, surface signing, and pavement markings.

Following a March 2007 hearing, the trial court denied defendant's motion for summary disposition. The trial court found that defendant was not immune from liability for plaintiff's injuries because it had jurisdiction over the sidewalk along the John R. overpass. The court did not reach the question whether defendant or MDOT had jurisdiction over the road surface on the overpass.

On appeal, defendant challenges the trial court's denial of its motion for summary disposition. Specifically, defendant argues that it was immune from liability because the highway exception to governmental immunity only applies to the governmental agency with jurisdiction over the highway and, according to defendant, MDOT had jurisdiction over the John R. overpass. We disagree.

We review a trial court's decision on a motion for summary disposition de novo, viewing the evidence in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 118-120; 597 NW2d 817 (1999). A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint, while a motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Id.* at 119. Where a motion is brought under both MCR 2.116(C)(8) and (10), but the parties and the trial court relied on matters outside the pleadings, as is the case here, MCR 2.116(C)(10) is the appropriate basis for review. *Driver v Hanley (After Remand)*, 226 Mich App 558, 562; 575 NW2d 31 (1997). If the evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Maiden, supra* at 120. MCR 2.116(C)(7) permits summary disposition where the claim is barred by immunity. *Id.* at 118. The trial court must consider all documentary evidence

submitted by the parties and accept all well-pleaded allegations as true, unless contradicted by documentation submitted by the opposing party. *Id.* at 119.

We review a trial court's findings of fact for clear error. *Markillie v Livingston Co Bd of Rd Comm'rs*, 210 Mich App 16, 22; 532 NW2d 878 (1995). "A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id.* A trial court's determination regarding the applicability of the highway exception to governmental immunity involves a question of law subject to de novo review. *Mitchell v Detroit*, 264 Mich App 37, 40-41; 689 NW2d 239 (2004).

Generally, a governmental agency is shielded from tort liability if it is engaged in the exercise or discharge of a governmental function. MCL 691.1407(1); *Grimes v Dep't of Transportation*, 475 Mich 72, 76-77; 715 NW2d 275 (2006). Pursuant to the highway exception, however, a person who sustains bodily injury or property damage "by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency." MCL 691.1402(1). Liability under the highway exception is limited to the governmental agency with jurisdiction over the highway and only one agency can have jurisdiction, as this Court does not recognize concurrent jurisdiction. MCL 691.1402(1); *Carr v Lansing*, 259 Mich App 376, 381; 674 NW2d 168 (2003); *Markillie*, *supra* at 20.

MCL 691.1401(e) defines a highway as "a public highway, road, or street that is open for public travel and includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway." But, the state and county road commissions' duty to repair and maintain only extends to "the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel." MCL 691.1402(1). Our Supreme Court has explained that although the highway exception does not explicitly establish local government liability for sidewalks, local governments have longstanding jurisdiction over sidewalks that run through their boundaries, even sidewalks along state or county roads. See *Listanski v Canton Twp*, 452 Mich 678, 686-687; 551 NW2d 98 (1996).

In *Jones v Ypsilanti*, 26 Mich App 574; 182 NW2d 795 (1970), the plaintiff was injured on a sidewalk along a state trunkline highway in the city of Ypsilanti and brought an action against the city for failing to maintain the sidewalk. *Id.* at 575. The city argued that because the state had exclusive jurisdiction over the highway and the definition of a highway included sidewalks, the city had no responsibility for defects in sidewalks along the highway. *Id.* at 576. This Court found that municipalities have "reasonable control over state trunkline highways located within their boundaries so long as that control pertains to local concerns and does not conflict with the paramount jurisdiction of the state highway commission." *Id.* at 580. The Court explained that in enacting 1964 PA 170, which revised governmental tort liability, the Legislature "provided by law that the jurisdiction and control of the state with regard to maintenance and liability extends only to the portion used for vehicular travel. It left the sidewalks to the reasonable control of the cities pursuant to art 7, § 29." *Id.* at 581. Accordingly, the Court concluded that the city was responsible for maintenance of the sidewalk along the state highway. *Id.*

In *Listanski, supra*, the plaintiff was injured on a sidewalk along a county road in Canton Township. *Id.* at 682. Approving this Court's reasoning in *Jones, supra*, and *Williams v Redford Twp*, 210 Mich App 60; 533 NW2d 10 (1995), the *Listanski* Court recognized that cities are responsible and liable for sidewalks along state or county roads. *Listanski, supra* at 684, 686-687 n 10, 689-690. The Court concluded that "townships are liable for injuries occurring on sidewalks that abut state or county roads as a result of their negligent failure to maintain their sidewalks in reasonable repair." *Id.* at 690. The Court further stated that "the Legislature intended municipalities to retain reasonable control over sidewalks within their boundaries, as long as the control pertains to local concerns and does not interfere with the state or counties' control over their highways." *Id.*

We are not persuaded by defendant's criticism of *Listanski, supra*, and *Jones, supra*. In arguing that those decisions were incorrectly decided, defendant primarily relies on the analysis articulated in the dissenting opinions in *Listanski*. See *Id.* at 691-701 (Weaver, J., dissenting and Riley, J., dissenting). Furthermore, defendant is incorrect in asserting that our Supreme Court's decisions in *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143; 615 NW2d 702 (2000) and subsequent cases "discredited" *Listanski* and *Jones*. In fact, the *Nawrocki* Court made no reference to either *Listanski* or *Jones*.

In light of our Supreme Court's reasoning in *Listanski* and this Court's reasoning in *Jones*, the trial court properly found that defendant had jurisdiction over the sidewalk along the John R. overpass and that it was not immune from liability for plaintiff's injuries. The trial court's decision is further supported by the amount of control defendant possessed over the sidewalk. This Court has held that the term jurisdiction, in the context of the highway exception, is synonymous with control. *Markillie, supra* at 22. Here, defendant admitted that it was responsible for maintaining the overhead lighting over John R. Street, and that it counted the mileage on the overpass for funding purposes. Moreover, the August 2002 MDOT memorandum established that defendant was responsible for maintaining the surface of locally owned roads and the sidewalks above state highways.

Additionally, defendant argues in its reply brief on appeal that the highway exception to governmental immunity is inapplicable here because the John R. overpass was barricaded and closed to vehicular travel at the time of plaintiff's accident. We are not persuaded by defendant's argument. In *Pusakulich v Ironwood*, 247 Mich App 80; 635 NW2d 323 (2001), this Court held that the highway exception did not apply to a sidewalk along a barricaded and temporarily closed road. *Id.* at 87. *Pusakulich* is, however, factually distinguishable from the instant case. In *Pusakulich*, the road was temporarily closed to "through traffic" for repairs to a water line. *Id.* at 81. In this case, it is undisputed that the John R. overpass was temporarily closed to vehicular traffic because of a football game at Ford Field. Presumably, defendant closed the overpass specifically to allow the mass of pedestrians leaving the football game to cross the overpass. Defendant cannot now escape liability for an injury suffered by a pedestrian

crossing the overpass. Accordingly, we find that the trial court properly denied defendant's motion for summary disposition.

Affirmed.

/s/ Brian K. Zahra
/s/ William C. Whitbeck
/s/ Jane M. Beckering